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ANNOTATION

USE OF PROPERTY BY PUBLIC AS AFFECTING ACQUISITION OF TITLE BY ADVERSE POSSESSION

by

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TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

3 AM JUR 2d, Adverse Possession §§ 6, 12–14, 50, 53

1 AM JUR PL & PR FORMS (Rev ed), Adverse Possession, Forms 41, 46, 75–76

1 AM JUR LEGAL FORMS 2d, Adverse Possession, §§ 11:14, 11:16–11:18, 11:34–11:38

1 AM JUR PROOF OF FACTS 271, Adverse Possession, Proof 4

ALR DIGESTS, Adverse Possession §§ 17–20

ALR QUICK INDEX, Adverse Possession

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TABLE OF JURISDICTIONS REPRESENTED

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RI	§ 5[b]	Va	§§ 3[a], 4[a]
Tenn	§ 5[b]	Wash	§ 6[a]
Tex	§§ 3[a, b], 5[a]	Wis	§ 6[a]

I. Introduction

§ 1. Prefatory matters

[a] Scope

This annotation[1] deals with the effect which public use[2] of property will have upon the claim of one seeking to acquire title[3] to that property by adverse possession. Excluded are cases involving the acquisition of title to property dedicated to the public use.[4]

Although cases within the scope of this annotation may be affected by statutory provisions in some states, such provisions are dealt with only insofar as they are reflected in reported decisions. The reader is therefore advised to consult the current statutory provisions of the jurisdiction in which he is interested.

[b] Related matters

Grazing of livestock or gathering of natural crop as fulfilling judicial elements of adverse possession. 48 ALR3d 818.

Acquisition of title to land by adverse possession by state or other governmental unit or agency. 18 ALR3d 678.

Adverse possession based on encroachment of building or other structure. 2 ALR3d 1005.

Adverse possession between cotenants. 82 ALR2d 5.

Adverse possession involving ignorance or mistake as to boundaries—modern views. 80 ALR2d 1171.

Acquisition by adverse possession or use of public property held by municipal corporation or other governmental unit otherwise than for streets, alleys, parks, or common. 55 ALR2d 554.

Title by or through adverse possession as marketable. 46 ALR2d 544.

Reputation as to ownership or claim as admissible on question of adverse possession. 40 ALR2d 770.

Adverse possession: sufficiency, as regards continuity, of seasonal possession other than for agricultural or logging purposes. 24 ALR2d 632.

Tacking adverse possession of area not within description of deed or contract. 17 ALR2d 1128.

Title by adverse possession as affected by recording statutes. 9 ALR2d 850.

Cutting of timber as adverse possession. 170 ALR 887.

Adverse possession of common. 9 ALR 1373.

1. It supersedes one at 2 ALR 1368.

2. As employed in this annotation, the phrase "public use" indicates a use by individuals in general without restriction or selection, as opposed to a use made only by a few specifically identified or identifiable individuals.

3. Cases involving the effect of public use on the claim of one seeking to establish an easement or any interest other than title to the property have been excluded.

4. See the annotation dealing with the acquisition by adverse possession of public property held by a governmental unit otherwise than for streets, alleys, parks, or commons, at 55 ALR2d 554, and one dealing with the adverse possession of a common, at 9 ALR 1373.

§ 2. Summary

[a] Generally

Courts which have dealt with the question whether one can acquire title by adverse possession to land which has been used by the public during the period of adverse possession generally have held that no title can be acquired if the public use indicates a claim of common or public right.[5] The rationale most frequently relied upon has been that the public use has destroyed the element of exclusiveness necessary for the acquisition of title.[6]

Cases which have held that the public need not be absolutely excluded, or that acquisition would be possible in spite of use by the public, have involved special situations in which the general rule was found not to apply.[7] For example, the general rule has been held inapplicable where the public use has been with the permission of the claimant or under circumstances where such permission could be implied.[8] In fact, permissive use may be helpful to the claimant since it may be seen as an indication of the intent of the claimant to possess and exercise control over the premises. It may also indicate that at least those members of the public who asked permission believed that the claimant was in fact the owner, and may thus help prove the notoriety of the possession.

It also has been held that a public use which is casual will not interfere with the acquisition of title by adverse possession.[9] The reasoning would appear to be that as long as the claimant has acted toward the property in a manner consistent with that of a real owner in dealing with casual uses made by the public, the exclusiveness of his possession should not be tainted.

A third and final exception to the general rule has been made by some courts in the circumstance where the use made by the public differed from the use made by the claimant.[10] It would appear that this exception should apply only under circumstances where the claimant's use was one which would be considered more substantial or more frequent than that of the public.

[b] Practice pointers

Counsel should be aware that in order for one to obtain title by adverse possession, the possession must be actual, open, visible, notorious, continuous, and hostile to the true owner's title and to the world at large. The possession must also have been for the whole period prescribed by statute, must have been under a claim of right or title, and, in some jurisdictions, must have been under color of title.[11] Since the law of adverse possession varies greatly from jurisdiction to jurisdiction, counsel is advised to examine statutory provi-

5. §§ 3[a], 4[a], 5[a], 6[a], infra.

See generally 3 Am Jur 2d, Adverse Possession § 53.

6. See, for example, Sanchez v Taylor (1967, CA10 Colo) 377 F2d 733 (applying Colorado law), infra § 3[a].

7. §§ 3[b], 4[b], 5[b], 6[b], infra.

8. For example, see Brant Lake Shores, Inc. v Barton (1970) 61 Misc 2d 902, 307 NYS2d 1005, infra § 4[b].

9. See, for example, Haney v Olson (1970), Colo App) 470 P2d 933, infra § 5[b].

10. See, for example, Stark v Stanhope (1971) 206 Kan 428, 480 P2d 72, 56 ALR3d 1172, infra § 5[b].

11. See generally 3 Am Jur 2d, Adverse Possession § 6.

sions and case law relating thereto in his jurisdiction.

In cases in which the effect of use of property by the public upon the acquisition of title by adverse possession has been considered, the central question has generally been whether, under the circumstances, the requisite actual possession existed. Actual possession involves both a present ability to control the property and an intent to exclude others from such control.[12] Counsel should note that evidence tending to prove these elements of possession differs in no material respect from that which goes to prove the other elements of adverse possession. Control and exclusive possession may be shown by evidence of the claimant's dominion, of his appropriation of the property for his own use and benefit, and of a type of possession which would characterize a typical owner's use.[13]

Although whether the claimant has posted the land, built fences, or required that the public ask his permission before using the land, are factors which may help to determine whether he in fact appropriated and maintained dominion over the property, such activities are not always practical or necessary. Several courts have indicated that the true test of whether acquisition should be permitted is not whether the public has use the premises, but whether the claimant has exercised the necessary control. Thus, where the claimant has exercised control similar to that expected from the average landowner under the circumstances, the fact that the public has also made use of the premises should not prevent acquisition of title.[14]

In accordance with the general rule that the burden of proof rests upon him who has the affirmative of an issue, the party relying upon a title by adverse possession has the burden of proving all of the facts necessary to establish such a title.[15] However, in some jurisdictions, the view has been taken that while a party relying upon adverse possession has the burden of proof, where that burden has been met by a showing of continuous, hostile possession of the land for more than the statutory period, the burden shifts to the other party.[16]

II. Nature of public use

§ 3. Pasturage

[a] Acquisition not effected

In the following cases in which the public had used the property in question as a pasture for the grazing of animals, the courts held that such use prevented the acquisition of title by a claimant, under the doctrine of adverse possession, in the circumstances stated.

Citizens of an area next to a tract of land were held by the court in Sanchez v Taylor (1967, CA10 Colo) 377 F2d 733 (applying Colorado law), not to be able to establish title to the property by adverse possession, where evidence indicated that the public had periodically used the land for the pasturing of animals, as a source of wood, and as a recreational site. The court stated that the use had

12. See 3 Am Jur 2d, Adverse Possession § 13.

13. See 3 Am Jur 2d, Adverse Possession § 50.

14. See, for example, Grimstad v Dordan (1970) 256 Or 135, 471 P2d 778, infra § 5[b].

15. For proof of adverse possession, see 1 Am Jur Proof of Facts 271, Adverse Possession, Proof 4.

16. See 3 Am Jur 2d, Adverse Possession § 248.

been in no way exclusive and affirmed a judgment for the owner, who was seeking to register title in his name under the Colorado Torrens Act.

The court in Hamilton v Weber (1954) 339 Mich 31, 62 NW2d 646, affirmed the judgment of a lower court in an ejectment action in which it had been held that the defendants had not acquired title to a tract of land by adverse possession, since it appeared that for a period during the alleged possession the land in question had been open to the public and that while the public had made use of the premises under circumstances indicating knowledge on the part of the defendants, they had not protested. Evidence was found indicating that the property had not been fenced, that cattle had occasionally roamed thereon, and that the defendants had had an agreement with the record owners which permitted the defendants to use the property as a cow pasture in return for supplying the owners with fertilizer or timber. The court stated that neither occupation in common with the public nor possession concurrent with that of the true owner or with the permission of the true owner could be considered exclusive possession.

Affirming the judgment of a lower court in an action to quiet title, the court in Lanning v Musser (1911) 88 Neb 418, 129 NW 1022, held that one of the defendants had not obtained title to a tract of unimproved, unfenced, and uncultivated land, on the ground that there was no evidence of exclusive adverse possession as required by law. It was found that although the defendant had grazed a large flock of sheep upon the land, his sheep had also grazed upon other lands not owned by him and upon which the stock of other people could go at pleasure. Stating that the tract was an open common, the court held that no effort at exclusive possession had been shown by the fact that at some time a fireguard had been plowed on two sides of the land, since that same fireguard had been extended around a number of other tracts owned by others, and since it was apparent that the fireguard's only purpose was to prevent fires from burning off the pasture of a large tract which the defendant desired to protect.

The grazing of cattle over a large tract of uninclosed and unimproved land upon which cattle owned by others also grazed was held not to be such exclusive possession as would warrant the creation of title in the defendant by virtue of adverse possession, in Opp v Smith (1914) 96 Neb 224, 147 NW 672.

Affirming the judgment of a lower court in an action to quiet title, the court in Johnston v Albuquerque (1903) 12 NM 20, 72 P 9, held that the plaintiffs had not acquired title by adverse possession to property which the evidence indicated had been used both as a common pasturage for those who desired to graze livestock thereon and as a source of soil and gravel for members of the public. The court stated that the plaintiffs' possession had not been exclusive, since occupation in common with the public generally was not such exclusive possession as would constitute a basis for establishing title by adverse possession.

In Tietzel v Southwestern Const. Co. (1944) 48 NM 567, 154 P2d 238, it was found that the claimant to title to an unfenced area of sandhills had carried on no work and made no substantial improvements, and that the general public had used the area as a sort of common for anything for

which they deemed it suitable. Noting that the public had used the land as a grazing area for animals, a dump, a source of gravel, a practice field for student engineers, and a proving ground for automobiles and motorcycles, without permission and generally without protest by the claimant, the court affirmed the judgment of the lower court, which had held that the claimant had not obtained title by adverse possession.

Evidence that anyone who so desired could use the unfenced tract of land in question, that the land was used as a common pasture, and that the plaintiffs in the action of ejectment had done little to improve the land beyond cultivating a portion of it at times and occasionally removing sand and gravel, was held to preclude the perfecting of title by adverse possession, in Parks v Pennsylvania R. Co. (1930) 301 **Pa** 475, 152 A 682. Affirming the lower court's entry of judgment n.o.v. for the defendant, the court stated that no exclusive possession could be based on a use of the land which was in common with the public.

The plaintiffs in an ejectment action to determine title to 175 acres of land were held to have failed to establish exclusive possession, in Henry v Grove (1947) 356 **Pa** 541, 52 A2d 451, wherein the court observed that such exclusive possession was a prerequisite to perfecting title by adverse possession. The court noted that the land had been used as a common pasture, and affirmed the judgment of the lower court, which had dismissed the plaintiffs' motions for judgment n.o.v. and for a new trial.

Stating that the use made of a vacant lot by one claiming title to that lot by virtue of adverse possession was too casual, not of sufficient continuity, and similar to the use made of the lot by the people of the city, the court in O'Hanlon v Morrison (1916, **Tex** Civ App) 187 SW 692, reversed a lower court judgment for the claimant. It was found that while the claimant had placed some lumber, a buggy, a wagon, and a mower on the lot and had grazed some cattle on the land during the grass season, others had frequently used the lot as a grazing area without permission. The claimant's use was held not to be of a character sufficient to notify the true owner of an intent to hold the property adversely to him.

See Walker v Maynard (1930, **Tex** Civ App) 31 SW2d 168, in which the court, while holding that two or more claimants could not hold jointly to obtain title by adverse possession, but that each must hold exclusively as against the world, stated that the mere running of stock upon an open range in common with others would not be sufficient to support title.

Although the claimant was found to have used the disputed tract of marshland more than anyone else, the court in Austin v Minor (1907) 105 **Va** 101, 57 SE 609, found that the land, which was valuable only to a limited extent as a range for hogs and as a recreation area for hunters, had been used by a great many people, and that for that reason, the claimant's occupation of the land could not constitute adverse possession.

[b] Acquisition effected

Claimants were found to have acquired title by adverse possession in spite of public use of the land for the pasturing of animals in the circumstances of the following cases.

Title to an unimproved tract of land which the defendant had gained by pasturing sheep thereon during the annual 6-month grazing season for the statutory period was held by

the court in Webber v Clarke (1887) 74 Cal 11, 15 P 431, not to have been destroyed by the fact that the tract had been a kind of thoroughfare for stock going to the mountains. The court held that even if there existed a right of way in the public for such purpose, it would not be inconsistent with the defendant's possession. The order denying the plaintiff a new trial to quiet title to the tract was sustained.

The court in Webb v Anderson (1949) 206 Miss 398, 40 So 2d 189, affirmed the portion of the decree of the trial court dismissing the plaintiffs' bill of complaint in an action to cancel a tax sale and other conveyances as clouds upon the plaintiffs' title, and held that the defendants had obtained title by adverse possession although, since the defendants had failed to file a cross bill, they were not entitled to a grant of affirmative relief confirming their title. The court rejected the contention that in view of the fact that the defendants had not themselves inclosed the land after their claim of ownership began, and inasmuch as they had used the land and 400 or 500 other acres within the existing inclosure in common with neighboring landowners, their possession of the land had not been exclusive. Stating that the holding of the court that the defendants' acts were sufficient to constitute adverse possession did not indicate that they had also obtained title to the other lands in the large area which they also used for pasturage, the court explained that the distinction lay in the fact that they were pasturing and using this land under claim and exercise of ownership and were paying taxes thereon, whereas they were not claiming any of the land of the neighboring owners under any color of title or otherwise, were not paying taxes thereon, and were not exercising supervision.

In Norgard v Busher (1960) 220 Or 297, 349 P2d 490, 80 ALR2d 1161, an action to quiet title to a strip of land which had been occupied by the plaintiff for farming purposes for the 10-year statutory period, the court affirmed a judgment quieting title in the plaintiff and stated that the fact that cattle from neighboring farms had occasionally found their way into the area claimed by adverse possession had not broken the continuity of the plaintiffs' adverse possession and had not rendered the possession nonadverse, since possession need not be absolutely exclusive, but need only be a type of possession which would characterize an owner's use.

The court in Sharrock v Ritter (1898, Tex Civ App) 45 SW 156, reversed the judgment of a lower court on the ground that the court had erred in refusing to instruct the jury that although a fence which was not sufficiently substantial to afford reasonable protection against the cattle of the neighborhood would not alone show exclusive and adverse possession on the part of the defendant, an occasional breaking of the fence by cattle or the cutting of the wire by others, by reason of which the cattle of the neighborhood entered upon the land, would not constitute a break in the possession, unless the fence was left in such a condition that the land was open to the cattle of the public for such a length of time as to justify the belief that the defendant did not intend to continue the exclusive appropriation of the same.

In Peveto v Herring (1946, Tex Civ App) 198 SW2d 921, it was held that the fact that from time to time persons other than the defendants, who claimed title to a tract of land by

virtue of adverse possession, had used the land for pasturage with the defendants' consent, did not affect the exclusiveness of the defendants' possession. Accordingly, the court reversed the judgment of the lower court, which had found for the plaintiff, on the ground that the court had erred in rendering judgment on the merits after the jury had been discharged, since the issue of whether the defendants had gained title to the land by adverse possession had been one for the jury.

§ 4. Recreation

[a] Acquisition not effected

Title to property which had been used as a recreation area by the public was held not to have been acquired by claimants in the circumstances of the following cases.

The court in Sanchez v Taylor (1967, CA10 Colo) 377 F2d 733 (applying Colorado law), held that citizens of an area next to a tract of land, the title to which the plaintiff was seeking to register in his name, could not establish title to the tract by adverse possession, because large numbers of the public had periodically used the tract as a recreational area, for the pasturing of animals, and as a source of wood, so that the use had been in no way exclusive. Accordingly, the court affirmed a judgment for the plaintiff.

The plaintiff's use of an island which had formed by accretion, for fishing purposes in common with the general public, was held by the court in Tracy v Norwich & W. R. Co. (1872) 39 **Conn** 382, not to have been such a use as to give the plaintiff title by adverse possession. Finding that the possession was not exclusive, since the public exercised the same right over the property as did the plaintiff, the court, in an advisory opinion, recommended that judgment be rendered for the defendants.

The court in Philbin v Carr (1920) 75 **Ind** App 560, 129 NE 19, reh den 75 **Ind** App 593, 129 NE 706, later app (**Ind** App) 162 NE 247, held that a claimant who had removed ice from an adjacent river, tarred nets, cut evergreens, gathered herbs and wild fruit, sold small quantities of timber, and hunted and trapped, had not obtained title to the tract of barren land in question. The court stated that since the general public had committed like acts with equal freedom, the claimant's possession had not been exclusive and would not constitute the basis of a title. The fact that the claimant's use had been entirely destructive and that she had never changed the area or improved it was stressed by the court.

In Austin v Minor (1907) 107 **Va** 101, 57 SE 609, the property in dispute was a marsh which was valuable only for hunting, fishing, and trapping, and to a limited extent, as a range for hogs. The court stated that although the defendant used and enjoyed the land for all purposes for which it was suited and to a greater extent than anyone else, a great many people hunted and trapped thereon, and that therefore the occupation of the defendant could not constitute adverse possession, which necessarily required open, notorious, exclusive, continuous, and adverse possession.

[b] Acquisition effected

The use of property as a recreation area by the public was held not to affect acquisition of title by adverse possession in the following cases.

Holding that in an action to establish title to ranch property by adverse possession, the mere casual intrusion by several fishermen had not de-

prived the plaintiff of the exclusive character of his possession or defeated his claim to the property, the court in McKelvy v Cooper (1968) 165 **Colo** 102, 437 P2d 346, affirmed a judgment quieting the plaintiff's title to the land, which the court found had been fenced and used for pasturage and haying by the plaintiff and his predecessors in interest for the requisite statutory period.

In Anderson v Cold Spring Tungsten, Inc. (1969) 170 **Colo** 7, 458 P2d 756, the court reversed the judgment of the lower court, which had quieted the plaintiff's title to the property upon which a vacation cabin was situated. The court found that in order for the adverse possession of the defendants to have been exclusive, it was not necessary that all use of the property by the public be prevented, and that the fact that the public had used part of the property for picnicking had not destroyed the exclusive possession of the property by the defendants. It was noted that testimony of the defendants indicated that during the times they had occupied the cabin, they had requested picnickers to leave the property, and that during periods of nonuse, the cabin door had been locked and shutters had been placed on the windows. It was also noted that there was no evidence of any public use of the cabin or the land which immediately surrounded it.

In Haney v Olson (1970, **Colo** App) 470 P2d 933, the court affirmed the judgment of the lower court, which had found that the plaintiff had proved all elements required to acquire title by adverse possession to two lots. Stating that the exclusiveness of the possession depended upon the plaintiff's action in asserting possession, as compared with the actions of the average landowner under similar circumstances, the court held that the fact that neighborhood children used the property as a shortcut and occasionally as a playground had not caused the plaintiff's possession to lack exclusiveness.

Modifying the decree of the lower court in order to quiet title in the defendant, who claimed title by adverse possession to part of a riverbank across a highway in front of his property, the court in Pulcifer v Bishop (1929) 246 **Mich** 579, 225 NW 3, found that the defendant had warned many people to keep off the premises in question, and that although there was evidence that some persons, especially his neighbors, used the dock which he had built and the beach which he maintained, the defendant had exercised all control of the premises that reasonably could be expected in view of their character and the well-known tendency of people to make free use of shores and beaches. The court stated that it was sufficient that the acts of ownership were of such a character as to openly and publicly indicate an assumed control or use which was consistent with the character of the premises in question.

It was held in Brant Lake Shores, Inc. v Barton (1970) 61 Misc 2d 902, 307 NYS2d 1005, that the fact that the general public had made use of the beach and waters which the plaintiff sought to claim by adverse possession would not destroy the plaintiff's claim, but rather would strengthen it, because such use had been encouraged by the plaintiff's predecessors, had been permissive in nature, and had been incidental to the use and occupation of the premises as a campground and picnic area. The court declared the plaintiff to be the owner in fee simple of the premises.

§ 5. Path, road, or parking area

[a] Acquisition not effected

In the circumstances of the cases which follow, the courts held that title to paths, roads, or parking areas not dedicated to public use, but used by the public, had not been acquired by one claiming title by virtue of adverse possession.

No title to a lot on the shore of a river was gained by the adverse possession of the claimant in Boulo v New Orleans, M. & T. R. Co. (1876) 55 Ala 480, in which the court found that the public's use of the area as a landing place for small boats and as a part of the street had prevented the claimant from exclusive appropriation. The court also noted that the area had been maintained and controlled by people other than the claimant, and that although the claimant had made use of the lot, no act of ownership had ever been exercised over it.

In Gittings v Moale (1864) 21 Md 135, ovrld on other grounds Patterson v Gelston, 23 Md 432, an appeal from a decision of the land office commissioner, the court reversed and held that where uninclosed land had been used as a common, over which all persons passed at will, such use was not sufficient to enable one so using the property to acquire title by adverse possession. The court stated that the acts of user and ownership relied on to establish title by adverse possession should be such as comport with the title or claim of one asserting ownership against all the world, and not such as might be done with impunity by any and all persons in common with him who claims to be the real owner.

In Nickson v Garry (1947) 51 NM 100, 179 P2d 524, although, as against the defendant, the plaintiff was the owner of the alley in question, the plaintiff had never been in adverse possession of the property, since the general public at all times had used the alley. The court refused to determine the rights of the public as against the plaintiff, since that issue had not been raised, and the lower court judgment was affirmed.

Dismissing a complaint of a school district and refusing to grant the requested injunction restraining the defendant from constructing a railway loop on a triangular piece of land adjacent to a school, the court in Borzilleri v Janes (1916, Sup) 157 NYS 195, held that the school authorities had not occupied the premises under claim of title to the exclusion of any other claim or right. The court found that the land was partially unfenced and unimproved, and that the defendant had cut weeds on the property and had been aware that schoolchildren and other members of the public used the land as a shortcut. It was stated that although the schoolchildren had perhaps used the land more frequently than anyone else, the defendant and the general public had also used it, and that the schoolchildren had never had exclusive use of it.

In Steadman v Pinetops (1960) 251 NC 509, 112 SE2d 102, it was held that since the plaintiffs and their predecessor in title had always, up until a time less than 2 years prior to the trial, without objection permitted the removal of their pasture fence to permit the defendant town to open and extend streets into and through the property, the plaintiffs had no claim of title to the land covered by the streets by virtue of adverse possession.

The laying of a sidewalk across an uninclosed lot and the planting of trees along that walk were held not to

be sufficient to entitle the person so doing to title to the strip of land covered by the sidewalk, in Green v Simpson (1912) 49 **Pa** Super 334, in which the court found that the sidewalk had been used in common with the public as a shortcut between a public highway and a railroad station. Affirming the judgment of the lower court, the court held that since the use had not been exclusive of that of every other person as is required to obtain title by adverse possession, the only right gained thereby was a right of way over the land.

In Harris v Wood County Cotton Oil Co. (1949, **Tex** Civ App) 222 SW2d 331, error ref n r e, an action in trespass to try title, the court held that the fact that the general public and the customers of the owner of a gin mill used a portion of the land in question as a parking area was not such use by the owner of the gin as would constitute, as a matter of law, that actual and visible appropriation of the land required under the provisions dealing with adverse possession. The court reversed the portion of the lower court judgment which had awarded title to that portion of the land to the mill owner.

Reversing a judgment that the defendants had gained title to a 30-foot strip of land by adverse possession, the court in Missouri P. R. Co. v Martinez (1961, **Tex** Civ App) 353 SW2d 233, held that although the defendants had proved possession of the land, they had failed to prove that their possession was exclusive. The court reasoned that the possession had not been exclusive, since the general public as well as customers of the plaintiff, who held record title to the land, had used the land as an approach to the plaintiff's place of business and for parking and turning vehicles. Rejecting the defendants' contention that they had tacitly consented to this use, the court apparently based its decision primarily upon a statement that an adverse user could not maintain exclusive possession while permitting the owner to use the land jointly with him.

[b] Acquisition effected

Title to land used as a pathway, road, or parking area by the public was found to have been acquired by adverse possession in the following cases.

For a case in which title was acquired by adverse possession in spite of the public's use of the land as a thoroughfare for stock going to the mountains, see Webber v Clarke (1887) 74 **Cal** 11, 15 P 431, supra § 3[b].

Stating that in order for possession to be considered exclusive, it was not necessary to prohibit any and all use of the property by the general public, the court in Haney v Olson (1970, **Colo** App) 470 P2d 933, affirmed the judgment of the lower court, which had found that the plaintiff, who sought to have title to two lots quieted, had proved all of the elements required for adverse possession. The court stated that whether or not possession was "exclusive" depended upon the claimant's action in asserting possession, as compared with the actions of the average landowner under similar circumstances. Evidence was found which indicated that the plaintiff had used the lots as a garden, playground, driveway, parking facility, and repository for trash cans, and that she had posted it as available for parking at a weekly fee. It was also found that the plaintiff had paid taxes on the property. The court pointed out that occasional casual use of property by others would not defeat a claim under adverse possession,

and that the fact that neighborhood children used the property as a shortcut and occasionally as a playground would not cause the plaintiff's possession to lack exclusiveness.

In Woodruff v Langford (1908, Iowa) 115 NW 1020, it was held that the use by the public of a right of way over land which the plaintiff sought to claim by adverse possession was not of such a character as to prevent the plaintiff's possession from being exclusive. Reversing the judgment of the lower court, the court noted that gates had been maintained by the plaintiff at both ends of the right of way, and that use of the way was by permission of the plaintiff.

Stating that the general rule that any use of premises by the public indicating a claim of common or public right would prevent the acquisition of title by adverse possession, did not apply where the use and occupation by the claimant and the public were not common uses, where the public had only permissive use of the land, or where the use by the public was casual, the court in Stark v Stanhope (1971) 206 Kan 428, 480 P2d 72, 56 ALR3d 1172, reversed the decision of the lower court, which had held that public use of a roadway leading across the property to a cemetery prevented the claimant, who had been in actual, open, and continuous possession of the property for more than 15 years, from obtaining title. The court held that the use made of the property by the claimant, who had cleared the property of brush, planted trees, placed buildings on the property, and harvested hay, was altogether different from the public's use of the roadway. It was also stated that the claimant's use of the property had been continuous and exclusive for its primary purpose, while the use of the public had been casual and infrequent.

In Grimstad v Dordan (1970) 256 Or 135, 471 P2d 778, a suit to quiet title in an unsurfaced lane and the land immediately adjoining it, the court rejected the contention of the defendant that since there was testimony that the people of the area sometimes used the lane to go to the river for picnics, the plaintiffs' possession of the land had not been exclusive. Stating that the statute of limitations had run prior to the period when the public began using the road, the court noted that most of those using the road had had the permission of the plaintiffs or their predecessors in interest. It was added that an occasional trespass is not inconsistent with a claim of ownership, since possession need not be absolutely exclusive as long as it is of the kind to be expected of an owner under similar circumstances. Accordingly, the court reversed the judgment of the lower court, which had established that the defendants were the owners of the property in question.

In Dodge v Lavin (1912) 34 RI 514, 84 A 857, it was held that the use of a part of the land in question as a thoroughfare by the public did not affect the possession of the person holding the land by adverse possession. Rejecting the contention that because of this use, which apparently had been made under the license of the adverse possessor and without any claim of right, the possession was not exclusive, the court denied a motion for reargument.

In Bensdorff v Uihlein (1915) 132 Tenn 193, 177 SW 481, 2 ALR 1364, it was held that the fact that the public used a small triangular lot in front of a store did not prevent the

storekeepers from obtaining title thereto by adverse possession. In reversing the lower court's decree in an ejectment suit, the court reasoned that the storekeepers had had exclusive possession of the land since it had been used by the public merely as a pathway, whereas the defendant storekeepers had used the lot as a paved entrance to the store. The court also indicated that the use by the public had been a permissive one.

§ 6. Miscellaneous

[a] Acquisition not effected

Property which had been used by the public for miscellaneous purposes not discussed in §§ 3–5, supra, was held not to have been acquired by the adverse possession of the claimants in the following cases.

In Boulo v New Orleans, M. & T. R. Co. (1876) 55 **Ala** 480, it was held that no title to a lot on the shore of a river had been gained by adverse possession, since there had been no exclusive appropriation to private use. The court found that the public had used the area as a landing place for small boats and as a part of the street, that it had been maintained and controlled by people other than the one claiming title, and that although the one claiming title had made use of the lot, no act of ownership had ever been exercised over it by him. Accordingly, the court held that title resided in the state, and affirmed a decree refusing to enjoin a railroad company from using the lot.

In Sanchez v Taylor (1967, CA10 Colo) 377 **F2d** 733 (applying Colorado law), it was held that a group of citizens living in an area adjoining the tract of land in question could not establish title to the tract by adverse possession, because large numbers of the public had periodically used the tract for cutting wood, pasturing animals, and recreational purposes, so that the use of the group had been in no way exclusive.

A judgment to the effect that the plaintiff's predecessor in title to a tract of land had had no right to the land and had gained no right by virtue of adverse possession, since he had shared dominion over the property with others who had occupied cottages thereon without permission and without paying rents, was affirmed in Short Beach Cottage Owners Improv. Asso. v Stratford (1966) 154 **Conn** 194, 224 A2d 532. The court stated that the use of the property by others was inconsistent with the exclusive possession necessary to claim title by adverse possession.

Stating that where a claimant occupies land in common with third persons or with the public generally, the possession is not such exclusive possession as will constitute the basis of a title, the court in Philbin v Carr (1920) 75 **Ind** App 560, 129 NE 19, reh den 75 **Ind** App 593, 129 NE 706, later app (**Ind** App) 162 NE 247, held that a claimant who had removed ice from an adjacent river, tarred nets, cut evergreens, gathered herbs and wild fruit, sold small quantities of timber, and hunted and trapped, had not obtained title to the tract of barren land in question, since the general public had committed like acts with equal freedom. The court noted that the land was of the wildest character and consisted of barren and shifting sand not susceptible to agriculture, grazing, mining, horticulture, or any other ordinary useful purpose or permanent improvement. The court stressed the fact that the claimant's use had been entirely destructive and that she had never changed the area to impress upon it the slightest evidence of civilization. Accord-

ingly, a judgment quieting title in the claimant was reversed.

In Union Elevator Co. v Kansas C. S. B. R. Co. (1896) 135 Mo 353, 36 SW 1071, the court reversed the judgment of the lower court and held that laying railroad tracks on a public levee and maintaining them for 10 to 14 years did not constitute such an exclusive and adverse use as would give the railroad title by adverse possession to the land covered by the tracks.

In Johnston v Albuquerque (1903) 12 NM 20, 72 P 9, it was held that the plaintiffs had not acquired title by adverse possession of property which had been used both as a common pasturage for those who desired to graze livestock thereon and as a source of soil and gravel for members of the public. The court stated that the possession of the plaintiffs had not been exclusive, since occupation in common with the public generally was not possession which would constitute a basis for establishing title by adverse possession.

Title to an unfenced area of rough sandhills was held not to have been obtained by adverse possession, in Tietzel v Southwestern Const. Co. (1944) 48 NM 567, 154 P2d 238, in which it was found that while the claimant had carried on no work and made no improvements, with the exception of posting occasional signs prohibiting dumping and hauling, the general public had used the area as a sort of common for anything for which they deemed it suitable. Affirming the judgment of the lower court, the court noted that the public had used the land as a dump, a source of gravel, a practice field for student engineers, a proving ground for automobiles and motorcycles, and a grazing area, without permission, and barring one or two occasions, without protest by the claimant.

Possession was held to be neither continuous nor exclusive in Turner v Ladd (1906) 42 Wash 274, 84 P 866, in which, although it was unclear what use had been made of the land in question, the court stated that the land had been only partially inclosed by a fence which had long since been destroyed, exposing the property to the public for nearly 20 years. The court stated that under the circumstances, the property had been no more in the possession of the plaintiff, who sought to claim title by virtue of adverse possession, than in the possession of anyone else.

In Kelley v Salvas (1911) 146 Wis 543, 131 NW 436, the owner of land on the bank of a river was held not to have gained title to the bed of the river opposite such land by adverse possession against the owner of the land under water, who had brought ejectment against the owner of the land on the bank. It appeared that the defendant had built a small dock and some boathouses on the submerged land immediately adjacent to his property, and that he claimed a space bounded by the sides of his property extended into the middle of the river. The court found that the dock and boathouses occupied only a small portion of this space. It was also found that people passed over the rest of the submerged land in boats and canoes, and that although the defendant had gained title by adverse possession to the extent of the land actually covered by his dock and boathouses and space to lay a boat alongside, he had performed no acts over the remaining submerged land which would give him title by adverse possession, since any person had to pass over this submerged land in a boat. The court reasoned that the

owner of the underwater land would have had no right to prevent such use.

[b] Acquisition effected

In the following case, the fact that the public had made a variety of uses of property was held not to have affected the acquisition of title to that property by adverse possession.

In Burrows v Gallup (1865) 32 **Conn** 493, in which the lower court had instructed the jury that in order to acquire title by adverse possession, it would be necessary to exclude every member of the public from the land which was claimed, in this case a public landing place at a wharf, it was held that the instruction was erroneous, and that the correct rule was that it was necessary only to exclude the public from possession. The court found that mere casual entries on the land, which were made without any intention of asserting a right of entry or possession, were not sufficient to break the continuity of exclusive possession in another.

Consult POCKET PART in this volume for later cases